



December 8, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

*Re: WC Docket No. 04-313, CC Docket No. 01-338; Triennial Review  
Remand Proceeding*

Dear Ms. Dortch:

CompTel/ASCENT ("CompTel") wishes to explain that, in the above-referenced proceeding, the FCC does not have the authority to prospectively preempt the authority of any state commission to arbitrate legal obligations between requesting carriers and incumbent carriers pursuant to the state's authority as a federal arbitrator under Section 252 of the Act. This includes the ability of the state commission to make fact-specific, and carrier-specific, impairment determinations in the context of arbitrations under Section 252 of the Act.

In Section 252(b) of the Act, Congress, anticipating that voluntary agreements between ILECs and CLECs may not be reached, prescribes the affirmative legal right of "compulsory arbitration". The language of this section must be considered the creation of a new, substantive, federal right. In allowing parties to avail themselves of "compulsory arbitration", Congress created a right that did not exist before. Indeed, the Supreme Court has stated that, "[o]rdinarily, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Air Line Pilots Ass'n v. Miller*, 118 S.Ct. 1761, 1767 (1997) citing *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). The fundamental organizing principle of most arbitrations is agreement: the parties arbitrate because they

have agreed to do so. Absent such an agreement, no court can compel them to submit to arbitration.<sup>1</sup>

However, in the Act, Congress has mandated that one party may request arbitration, and the other party must submit. Moreover, Congress prescribed procedures and standards for the arbitrators to follow, and designated forums for the arbitrations—parties should seek arbitration first at the State Commission, but, if the State Commission fails to act, the FCC is designated as the forum for arbitration. §252(b)(1), (5). Therefore, in enacting §252(b) of the Act, Congress created a new, substantive, federal right and remedy.

In providing for “compulsory arbitration”, Congress used a word that already had an established meaning in the body of federal substantive law, and even though it delegated this process to the states, it is doubtful that Congress intended the word to take on 50 different meanings.<sup>2</sup> This is especially true considering that the word “arbitration” already had a clearly established meaning under existing law<sup>3</sup>—that given to it under the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*<sup>4</sup> In fact, at the time Congress enacted the Act, “the Supreme Court ha[d], by an expansive reading of the FAA, largely supplanted state law, so that today, almost all agreements to arbitrate will be subject to the federal statute.”<sup>5</sup>

Under 252(b)(1), state commissions are specifically empowered to arbitrate “any open issues.” Once a state commission accepts an arbitration petition, they have all the powers of an arbitrator under federal substantive law. These powers are exceedingly broad under the Act itself, and the arbitrator (state commission) can resolve “any open

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<sup>1</sup> See also *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 247 (5th Cir. 1998) (“Unless required by statute, a person who is not a party to a pre-dispute contract to arbitrate cannot be compelled to submit a dispute to arbitration.”); *Pennzoil Exploration & Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998) (“Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate the dispute in question.”).

<sup>2</sup> “Uniform laws are commonly interpreted in light of provisions contained in other uniform laws.” Sutherland, *Statutory Construction*. (5<sup>th</sup> edition) §53.04, p. 237.

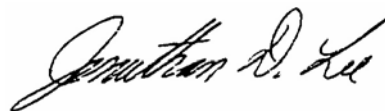
<sup>3</sup> “In the absence of a contrary legislative command, when two Acts of Congress touch upon the same subject matter the courts should give effect to both if that is feasible.” *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1<sup>st</sup> Cir. 1994) citing *City Pipefitters Local 562 v. U.S.*, 407 U.S. 385, 432 n. 43(1972). See also Sutherland, §51.02, p.121. (“It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. . . . In the absence of express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they should all be construed together.”)

<sup>4</sup> By its own terms, the FAA applies to arbitrations involving issues of interstate commerce. 9 U.S.C. at § 2. The FAA also exempts from coverage certain contracts involving employment contracts of workers involved in interstate or foreign commerce. *Id.* Courts have interpreted this provision to hold that the FAA does not apply to collective bargaining agreements, which are also subject to arbitration under §301 of the Labor Management Relations Act, 29 U.S.C. §185 (“LMRA”). “The Court looks to the FAA in LMRA arbitration cases, even though by its own terms it does not apply to contracts for employment of workers involved in interstate of Foreign Commerce.” *United Paperworkers Intl. Union v. Misco*, 108 S.Ct. 364, n.9 (1987).

<sup>5</sup> Williston on Contracts, 4<sup>th</sup> edition, 1977, (Richard Lord, ed.) Vol. 7, §15:11, p. 188. See also, *Baravati v. Josephthal Lyon & Ross Inc.*, 834 F.Supp. 1023, 1029 (N.D. Ill. 1993), *aff’d* 28 F.3d 704 (7th Cir. 1994) (“In the absence of an express choice of law provision, the FAA prevails.”).

issues” and “impos[e] conditions” on the parties. The state’s only limitation in fashioning an agreement is that the agreement must meet the requirements of 251, including the FCC rules implementing Section 251. Section 252(c)(1). This limitation is phrased in the nature of a floor, not a ceiling. Nothing in the Act suggests that the broad affirmative powers of an arbitrator, as they currently exist under federal substantive law (Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*), are intended to be limited in any way.<sup>6</sup> Therefore, “[w]here Congress uses terms that have accumulated settled meaning under common law, the Court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms.” *Field v. Mans*, 116 S. Ct. 437 (1996). Thus, the Commission has no authority under the Act to prospectively limit the powers Congress delegated to the states—the powers of federal arbitrators under the FAA. These powers include the authority to make fact-specific, carrier-specific impairment determinations and impose such legal obligations between the parties to an arbitration as may follow from these determinations.

Sincerely,

A handwritten signature in black ink, reading "Jonathan D. Lee". The signature is written in a cursive, flowing style.

Jonathan Lee  
Sr. Vice President  
Regulatory Affairs

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<sup>6</sup> “There is a presumption that a statute is consistent with the common law, and so a statute creating a new remedy or method of enforcing a right that existed before is regarded as cumulative rather than exclusive of the previous remedies.” Sutherland, §50.05, p. 109.